Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

MARIAH BOATS, INC.,
Petitioner,

v.

REX SLANE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a plaintiff in a workers' compensation retaliatory discharge action may recover damages from an employer where the plaintiff offers no evidence that, at the time of the discharge, the employer believed the employee had suffered an injury or illness which could result in a workers' compensation claim.

II. Whether a plaintiff in a retaliatory discharge action may recover damages from an employer where the plaintiff offers no direct evidence that the employer's valid reason for discharging the employee was a mere pretext.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Mariah Boats, Inc. is a corporation with no parent companies or nonwholly-owned subsidiaries.

Respondent

Respondent Rex Slane is an individual.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 164 F.3d 1065 (7th Cir. 1999). A copy of the Opinion is included in Appendix A at 1a-8a. A copy of the order of the United States Court for the Southern District of Illinois denying the Petitioner's post-trial motion is included in Appendix B at 9a-19a. A copy of the judgment of the United States Court for the Southern District of Illinois is included in Appendix C at 20a-21a. The order of the United States Court of Appeals for the Seventh Circuit denying rehearing is included in Appendix D at 22a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on January 11, 1999. On January 25, 1999, the Petitioner filed a Petition for Rehearing which the United States Court of Appeals denied on February 9, 1999. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Rex Slane (Slane) was employed by Mariah Boats, Inc. (Mariah). In June of 1994, Slane's employment with Mariah was terminated after Mariah received a report that Slane had refused to provide a urine specimen for a drug test. On November 3, 1994, Slane filed his initial three-count Complaint and Demand for Jury Trial with the United States District Court for the Southern District of Illinois. On January 23, 1995, Slane filed an Amended Complaint and Demand for Jury Trial. Count I of both complaints alleged that Mariah discharged Slane in order to interfere with his

benefits under ERISA. Counts II and III of both complaints alleged that Mariah discharged Slane to retaliate against him for exercising rights under the Illinois Workers' Compensation Act. Count II sought compensatory damages while count III sought punitive damages. The District Court had jurisdiction over Count I pursuant to 28 U.S.C. § 1331. The District Court had jurisdiction over Counts II and III pursuant to 28 U.S.C. § 1367.

On February 5, 1996, in a separate case, Slane filed a complaint alleging that Mariah discharged him because he has diabetes and that his discharge violated the Americans With Disabilities Act (ADA). The second case was subsequently consolidated with the initial action and was designated count IV of the amended complaint. The District Court had jurisdiction over Count IV pursuant to 28 U.S.C. § 1331.

By Memorandum and Order entered September 20, 1996, the District Court awarded Mariah summary judgment on the ERISA claim, finding that Slane had "not created a genuine issue of material fact about whether Mariah's proffered reason for terminating him was a pretext." By Memorandum and Order entered August 7, 1997, the District Court denied Mariah's motion for summary judgment as to the three remaining counts.

The remaining three counts were tried to a jury from October 20, 1997 through October 23, 1997. At the close of the plaintiff's case-in-chief, Mariah moved for judgment as a matter of law on all three counts. The District Court granted Mariah's motion as to the ADA claim, finding that Slane was not a disabled person under the ADA. The District Court denied the motion as to the two counts brought under the Illinois Workers' Compensation Act. At the close of the defendant's evidence, Mariah again moved for judgment as a

matter of law on the remaining two counts. The District Court denied the motion and gave the case to the jury. The jury awarded Slane $50,000.00 in back pay and benefits, $50,000.00 in compensatory damages for intangible losses and $125,000.00 in punitive damages. The District Court denied Mariah's post-trial motion for judgment as a matter of law or, alternatively, for a new trial or remittitur. The District Court entered judgment in favor of Slane for $225,000.00. The District Court also awarded Slane costs in the amount of $5,157.42.

Mariah filed a timely appeal with the Court of Appeals for the Seventh Circuit. On January 11, 1999, the Court of Appeals affirmed the judgment of the District Court. Mariah's Petition for Rehearing was denied on February 9, 1999.

ARGUMENT

This case is representative of a disturbing trend in the area of employment law: an at will employee who is discharged for cause is permitted to utilize, and even recover damages under, the laws of the United States and the employee's State even though there is no evidence that the discharge resulted from an illegal motivation on the part of the employer.[1] Certainly, employees are protected from employment discrimination or retaliation based on the

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[1] In this case, the cause for which Slane was discharged was his refusal to cooperate with drug testing procedures under the Drug and Alcohol-Free Workplace Policy of Mariah, the Petitioner. Slane had agreed in writing on January 15, 1994 that he would cooperate with that policy. Mariah was informed verbally and in writing that Slane refused to cooperate with that policy because he refused to provide a urine specimen for testing.

employees' protected status or protected activities. Thus, an employer may not legally discharge an at will employee because of the employee's race, national origin, sex, age, or disability. Nor may an employer legally discharge an at will employee because that employee engages in an activity or exercises a right which is protected by law, such as the filing of a workers' compensation claim.

However, unless an employer's motivation for discharging an at will employee is illegal or violates a public policy, the employee may be discharged for good reason or for no particular reason at all. *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 704 N.E.2d 403 (Ill. 1998). The judgment in the District Court against Mariah Boats, Inc. and the Court of Appeals' affirmance of that judgment ignore that basic tenet of employment law. For a discharge to be actionable, there must be some causative connection between the discharged employee's protected status or protected activities and the termination of employment. If there is no evidence which reasonably permits an inference that the employer acted in violation of law or public policy, then no recovery may be had by an employee -- regardless of the circumstances surrounding the discharge. The jury and the Court of Appeals may not have approved of the manner in which the Respondent was discharged. However, such disapproval does not permit a disregard of the evidence and the law.

I. The evidence did not support a *prima facie* case for retaliatory discharge under the Illinois Workers' Compensation Act.

In order to state a cause of action for retaliatory discharge under the Illinois Workers' Compensation Act (Act), a plaintiff must provide evidence that "the discharge

was causally related to the exercise of rights under the Act." *Miller v. J.M. Jones Company*, 225 Ill. App. 3d 799, 587 N.E.2d 654, 657 (4th Dist. 1992). Evidence of this causal relationship is part of the plaintiff's *prima facie* case; if no evidence of causation exists, then summary judgment or a directed verdict is required. Slane's retaliatory discharge claim under the Act should never have reached the jury. Once the jury was given the case, the element of causation was ignored by the jury. The jury heard no evidence which directly or indirectly supported a finding that Mariah believed Slane had suffered a work-related illness and could be filing a workers' compensation claim in the future.

While a jury may not like the treatment received by a discharged plaintiff, the mere fact that the plaintiff could have been treated more kindly does not permit the jury to impute an illegal motive to the employer where no evidence of that motive exists. Slane was not entitled to a verdict merely by convincing the jury that he was treated unkindly or unfairly. Rather, it was his burden to show that Mariah's motivation in discharging him was related to a potential workers' compensation claim. The District Court, the jury and the Court of Appeals ignored that prerequisite.

Slane was discharged on June 16, 1994. Slane did not file a workers' compensation claim prior to that date. He did file a claim on November 2, 1994, nearly five months after his last day of work with Mariah.[2] Therefore, a recovery by Slane for retaliatory discharge under the Illinois Workers'

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[2] On November 2 and November 3, 1994, Slane filed his workers' compensation claim, a charge with the Equal Employment Opportunity Commission, a state court defamation action and the present case.

Compensation Act is only possible if there is evidence that he suffered a work-related injury and Mariah believed he was going to file a claim in the future. *Hinthorn v. Roland's of Bloomington*, 119 Ill. 2d 526, 519 N.E.2d 909 (Ill. 1988). There was no evidence presented at trial to support such a theory of retaliation.

When Slane left Mariah on June 16, 1994, no one had any reason to believe that Slane had suffered a work-related injury or illness. Slane, who was diabetic, testified that he thought his illness was related to "low sugar." Slane told Michael Miller, his lead man, that he thought he was having a "sugar attack." Slane also testified that Miller told Guy Coons, Mariah's Human Resources Director, that "something was wrong with [Slane's] sugar." The jury heard no evidence that anyone at Mariah believed Slane experienced a work-related injury or illness on June 16, 1994. The jury heard no evidence that Slane or anyone else notified Mariah's Managers that the working conditions at the Mariah plant were in any way involved in Slane's illness. The jury heard no evidence that Slane or any other Mariah employee complained about the temperature in the plant on June 16, 1994. There was simply no evidentiary basis for a conclusion that Mariah anticipated a workers' compensation claim would arise out of Slane's "sugar attack."

Because Slane exercised no rights under the Illinois Workers' Compensation Act prior to his discharge, to prevail he was required to provide evidence that Mariah believed he was going to file a workers' compensation claim based upon his claimed illness at work on June 16, 1994. Without such evidence, there could not possibly be "retaliation" against Slane. He did not provide that evidence. Nothing offered at trial could lead a reasonable jury to conclude that anyone at Mariah, including Slane himself, believed Slane's illness was

related to his work environment. Moreover, nothing offered at trial even hinted that Slane's symptoms known to Mariah at the time of Slane's discharge from employment were (1) anything more than a "sugar attack" or (2) work-related. Based on the total absence of evidence supporting a conclusion that Slane's injury could be viewed as work-related or that it was seen by Mariah as being work-related, the judgment against Mariah cannot stand.

At only one point in its opinion did the Court of Appeals cite evidence purportedly supporting the allegation that Mariah possessed knowledge sufficient to infer a retaliatory motivation behind Slane's discharge:

> The jury heard evidence that it was hotter than 80 degrees in the factory on the day Slane was asked to submit to the drug test; that Slane suffered heat-related symptoms on the job; that Guy Coons (Mariah's human resources director and the author and administrator of Mariah's Drug- and Alcohol-Free Workplace Policy) knew Slane was suffering heat-related symptoms;
>
> . . . .

App. A at 6a.

These three assertions are the totality of evidence cited by the Court of Appeals to support a finding that Mariah believed Slane could file a workers' compensation claim in the future. The first assertion is somewhat misleading because it relies on a mere snippet of testimony.

The only time that the temperature in the factory was specifically addressed at trial was during the testimony of

Jeremy (Chad) Miller, a fellow employee of Slane. The following colloquy occurred between counsel for Slane and Miller:

> Q. The temperature in the upholstery department area that day was in the 80s, wasn't it?
>
> A. Yes.

Miller's almost off-handed statement regarding the temperature in the plant does not substantiate the time of day to which he was referring or whether his testimony relates to the time in the morning when Slane became ill.

More significantly, the third assertion, which is the only statement implying knowledge possessed by a Mariah administrator, is not supported by the record. Nothing in the record or in Slane's prior arguments supports an assertion that Guy Coons or anyone else at Mariah knew or had reason to believe Slane was suffering heat-related symptoms at the time he was discharged from employment. Slane was not diagnosed with heat exhaustion until after he was taken to the hospital. Guy Coons did not know of such a diagnosis when Slane's employment was terminated. Guy Coons is not a physician who can be charged with the expertise of knowing what heat-related symptoms are. Guy Coons knew only that Slane, and all those Slane talked to, stated that he was having a sugar attack.

There was simply nothing for Mariah to retaliate against because there was no workers' compensation claim and no hint that one would be forthcoming. Thus, a workers' compensation claim or the threat of one could not have "caused" the decision to discharge Slane. Because there was

no evidence to support the causation element of the plaintiff's *prima facie* case, Mariah was entitled to judgment as a matter of law.

II. There was no evidence that Mariah's proffered reason for discharging Slane was a pretext for a retaliatory motivation.

On the morning of June 16, 1994, around the same time Slane was requested to go to Franklin Hospital to provide a urine specimen for a drug screen, he complained of illness. Rather than go to Franklin Hospital which was Mariah's urine specimen collection site, Slane insisted on seeing his own doctor. When Slane's doctor was unavailable, Slane went to a different hospital where his doctor possessed privileges.

While at the hospital, Slane was repeatedly asked for a urine specimen, but did not provide one for more than 25 hours after arriving at the hospital. Betty Batts, who worked in the hospital laboratory, telephoned Julie Dunphy on June 16 to inform her that Slane refused to provide a urine specimen. Dunphy was an employee of National Safety Alliance, a third-party contractor which independently administered Mariah's drug and alcohol-free workplace policy. Dunphy, in turn, telephoned Guy Coons at Mariah on June 16 and informed him that Slane had "refused to give a urine specimen." On June 17, Dunphy faxed a letter to Coons which stated that Slane "had refused the drug screen collection." Based on NSA's independent report that Slane refused to cooperate with drug testing, Slane was discharged. Thus, Mariah had a valid, non-retaliatory reason for terminating Slane's employment -- a reason which was supported by three independent witnesses at trial.

Under Illinois law, a plaintiff establishes a *prima facie* case for retaliatory discharge by establishing all three of the following elements:

1. The plaintiff was an employee before his injury on the job;

2. The plaintiff exercised a right granted by the Illinois Workers' Compensation Act; and

3. The plaintiff was discharged and the discharge was causally related to the exercise of rights under that Act.

Miller v. J.M. Jones Co., 225 Ill. App. 3d 799, 587 N.E.2d 654, 657 (4th Dist. 1992). Therefore, evidence of a causal relationship between an exercise of rights under the Act and the plaintiff's discharge is part of the plaintiff's *prima facie* burden; if no evidence of causation exists, then summary judgment or a directed verdict for the employer is required.

Causation does not exist if the employer provides a valid, non-retaliatory reason for discharging the employee and that reason is not shown to be a pretext to disguise an illegal motivation. *Hartlein v. Illinois Power Company*, 151 Ill. 2d 142, 601 N.E.2d 720 (5th Dist. 1992). In comparable cases involving claims of discrimination, the Court of Appeals for the Seventh Circuit has defined the term "pretext" as "a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)(Title VII context). In awarding Mariah summary judgment on Slane's ERISA claim, the District Court held that Mariah provided a valid reason for discharging Slane -- Mariah received reports that Slane refused to provide a urine specimen for his required drug screen. It is uncontested that Slane failed to provide a

urine specimen for more than 25 hours and that National Safety Alliance informed Mariah verbally and in writing that Slane refused to provide a specimen. Mariah's valid, non-retaliatory basis for discharging Slane was not a "lie" or a "phony reason" and stands unchallenged to this day. Because that reason is not a pretext, Slane did not establish the *prima facie* elements of his cause of action and the judgment against Mariah must be reversed.

Moreover, when Slane's refusal to cooperate with the required drug testing is coupled with Mariah's limited knowledge about Slane's medical condition, the fatal flaw in Slane's case becomes clearer. The District Court itself acknowledged this flaw in its Memorandum and Order of September 20, 1996 when it stated, "In any case, the actual reason that Slane did not give a urine sample is irrelevant because the issue in this motion is Mariah's state of mind at the time it made the decision to fire Slane." The District Court obviously recognized that the liability of an employer can only exist if the employer has the requisite state of mind, i.e., an intent to violate an employee's rights through retaliation. Despite this identification of the crucial issue of motivation, the District Court and the Court of Appeals disregarded that very issue by ignoring the absence of evidence that Mariah possessed a retaliatory intent at the time Slane was discharged from his employment. Mariah, in fact, knew only that Slane had a "sugar attack" at work and that he was refusing to provide a urine specimen for a drug test. Therefore, Mariah's "state of mind" could not have included the retaliatory motivation required for liability.

CONCLUSION

The Illinois Workers' Compensation Act forbids retaliation against an employee who exercises rights granted by the Act. Rex Slane exercised no rights under the Act prior to his discharge. At the time of Slane's discharge from employment, Mariah Boats, Inc. had no inkling that Slane could ever exercise any right under the Act based on his claimed illness of June 16, 1994. Mariah Boats, Inc., acting on information obtained from an independent source, discharged Slane for a reason which the District Court found was not a "lie" or a "phony reason." Slane failed to provide evidence supporting a conclusion that his sugar attack at work "caused" Mariah to discharge him in retaliation for some future claim under the Illinois Workers' Compensation Act. Mariah simply could not have the state of mind to retaliate against Slane at the time he was discharged. Slane cannot recover damages simply because he did not like the way he was treated by Mariah. Slane was required to satisfy his burden of showing that Mariah had an illegal motive when discharging him. He did not do so, a fact which was ignored by the jury and the Court of Appeals. Therefore, this Court must reaffirm the rule of law -- a defendant cannot be punished where no violation of law occurred.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed January 11, 1999]

Nos. 98-1127/1128

REX SLANE,
Plaintiff-Appellee, Cross-Appellant,

v.

MARIAH BOATS, INCORPORATED,
Defendant-Appellant, Cross-Appellee.

OPINION

Argued September 22, 1998
Decided January 11, 1999

Before BAUER, MANION, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Rex Slane, a diabetic, worked in the upholstery department at Mariah Boats, Inc. from 1992 until June 1994, when Mariah fired him for refusing to take a drug test (at least that's what Mariah said). Under Mariah's "Drug- and Alcohol-Free Workplace Policy," which started in January of 1994, an employee who refuses to take a drug

test is fired immediately unless he certifies his refusal in writing at the time he is asked to take the test and provides a valid medical reason (we assume promptly) for refusing to be tested. Mariah tested its employees on random and "reasonable suspicion" bases, both designed to surprise employees. Mariah hired a third-party administrator, National Safety Alliance, to test employees and report the results.

On June 8, 1994, two employees reported seeing Slane in the bathroom with white power under his nose. The company took no immediate action to confirm whether Slane was using drugs or to remove Slane from his job, where he handled knives, scissors, and a powerful stapler. Eight days later, however, the company asked Slane to take a drug test. Slane apparently agreed but then got sick, either from a diabetic attack or from heat exhaustion triggered by hot temperatures--there was evidence that it was over 80 degrees--in the factory that day. Slane was taken to a nearby hospital, where he was admitted. NSA tried to conduct the drug test despite Slane's illness but was unable to do so. The parties presented conflicting evidence as to why NSA was unable to test Slane. Mariah presented evidence that Slane refused to take the test; Slane introduced evidence that he was physically unable to take the test. But in either case, the evidence clearly showed that NSA told Mariah Slane refused to be tested and Mariah then fired Slane. Slane eventually took the test the next day and passed. But by then the company had already fired him.

Slane sued Mariah claiming it fired him to avoid having to give him health benefits in violation of ERISA. Slane also claimed Mariah fired him in retaliation because he exercised his rights under the Illinois Workers' Compensation

Act. Slane later filed another complaint claiming Mariah fired him because of his diabetes in violation of the Americans with Disabilities Act. The court consolidated the two complaints.

Before Slane filed his second complaint, Mariah moved for summary judgment on the ERISA count, arguing that it fired Slane for a legitimate reason: refusal to take a drug test. Mariah also moved for dismissal of Slane's IWCA claims, arguing that without the ERISA claim the court lacked jurisdiction to hear the IWCA dispute. The court ruled on the motion after Slane filed the ADA claim and therefore denied the motion with respect to the IWCA claims (because the ADA claim provided a basis for supplemental jurisdiction). But the court granted the motion with respect to the ERISA claim, finding that Mariah had a legitimate, nondiscriminatory reason for firing Slane and Slane failed to offer evidence that Mariah's stated reason was a pretext to cover an alleged discriminatory motive.

Mariah later filed a second motion for summary judgment on the ADA claim. For purposes of this motion, Mariah conceded that Slane stated a prima facie claim of discrimination under the ADA but argued that Slane's inability to show pretext should have entitled Mariah to judgment on the ADA claim, just as it had on the ERISA claim. Mariah asked the court to dismiss the IWCA claims for the same reason. This time, Slane offered additional evidence to support his theory that Mariah's stated reason for firing him was pretext and, because of that evidence, the court denied Mariah's motion in its entirety.

The case was tried to a jury and, after Slane presented

his case-in-chief, Mariah moved for judgment as a matter of law, arguing for the first time that Slane failed to make out a prima facie case of discrimination under the ADA. The court agreed and snatched the ADA claim from the jury. After the close of all the evidence, Mariah moved for judgment as a matter of law on the IWCA claims, still pushing its theory that Slane failed to show pretext. The court denied that motion and sent the IWCA claims to the jury, which awarded Slane $100,000 in back pay and compensatory damages and $125,000 in punitive damages.

After the verdict, Mariah again moved for judgment as a matter of law. Alternatively, Mariah moved for a new trial or remittitur, arguing that the evidence did not support the jury's verdict and that the award was excessive, the result of passion and prejudice. The court denied the motion. Slane moved for costs and, in response, so did Mariah. The court found Slane to be the prevailing party and awarded him $5,157.42. Mariah's motion for costs, of course, was denied.

The parties filed cross-appeals, claiming error in virtually every single pre- and post-trial ruling by the district court. Mariah also challenges the jury's verdict and the court's decision to award costs to Slane. Slane's counsel conceded at oral argument that he appealed only to salvage some basis for damages in the event we overturn the jury's damages award on the IWCA claims. Because we are upholding the award, we will not discuss Slane's arguments on appeal except to say that they lack merit. Nor will we discuss point by point each of Mariah's challenges to the proceedings below. Mariah, subscribing to the shotgun theory of appellate practice, argues that all of the court's rulings below should be reversed. Mariah's arguments about how the

court handled its first and second summary judgment motions and its original and renewed motions for judgment as a matter of law all sound pretty much the same: the court was wrong to rule in Slane's favor because Slane failed to offer evidence showing Mariah's stated reason for firing Slane was a pretext to disguise its discriminatory motive. As we explain below, Slane did offer such evidence. Indeed, the testimony of Mariah's own employees provided enough for the jury to conclude that Mariah was lying when it said it fired Slane because he refused to take a drug test. Thus Mariah's multipronged attack in this regard must fail. We discuss below Mariah's remaining arguments: (1) that it should be given a new trial because the jury's verdict and award were contrary to the evidence and excessive; and (2) that the court abused its discretion in awarding costs to Slane.

The district court denied Mariah's motion for new trial and Mariah appeals, raising the same arguments on appeal as it did below--namely, that the verdict was not supported by the evidence, that the award was excessive and that it reflects passion and prejudice on the part of the jury. Our review of the district court's denial of Mariah's motion is deferential; we will reverse only under exceptional circumstances showing a clear abuse of discretion. *Riemer v. Illinois Dep't of Transp.*, 148 F.3d 800, 806 (7th Cir. 1998); *Cygnar v. City of Chicago,* 865 F.2d 827, 835 (7th Cir. 1989).

The court may award a new trial if the verdict is not rationally connected to the evidence, if it is born out of passion and prejudice, or if it is monstrously excessive. *American Nat'l Bank & Trust Co. of Chicago v. Regional Transp. Auth., 125 F.3d 420, 437 (7th Cir. 1997).* The district court applied this standard and concluded that the

verdict and award were consistent with the evidence. We agree. The jury heard evidence that it was hotter than 80 degrees in the factory on the day Slane was asked to submit to the drug test; that Slane suffered heat-related symptoms on the job; that Guy Coons (Mariah's human resources director and the author and administrator of Mariah's Drug- and Alcohol-Free Workplace Policy) knew Slane was suffering heat-related symptoms; that Coons knew any increase in health benefits claims would cause the company's insurance premiums to go up; that Coons fired Slane the very day he was admitted to the hospital; that the company had enforced its drug policy inconsistently; and that Coons deliberately refrained from investigating whether Slane had actually refused to take the drug test. All of this evidence supports the jury's verdict.

The fact that Mariah presented evidence that is inconsistent with the jury's verdict does not mean the verdict should be reversed. In denying Mariah's new trial motion the district court noted that this was a close case with sufficient evidence on both sides to support a verdict for either party. No doubt that is frustrating for Mariah. But the district court had to defer to the jury's verdict and so must we. See *Riemer*, 148 F.3d at 806 (we are "particularly careful in discrimination cases to avoid supplanting our view of the credibility of the evidence for that of both the jury (in its verdict) and the judge (in not interfering with the verdict")).

Similarly, the damages award was consistent with the evidence. The jury awarded Slane $50,000 in back pay and benefits, $50,000 in compensatory damages, and $125,000 in punitive damages. The damages award reflected rational consideration of the evidence, and we will not second guess the jury's decision. The evidence also supported the jury's

punitive damages award. The evidence, viewed favorably in support of the verdict, showed that Mariah's conduct was heartless--it fired an employee while he was lying in the hospital and refused to reconsider that decision even after a doctor explained that Slane was physically unable to take the requested drug test. Coons admitted that he failed to investigate Slane's refusal to take the drug test and that he fired Slane even before NSA confirmed Slane's refusal. Coons and Jimmy Fulks, Mariah's president, testified that they didn't test Slane immediately after learning he was using drugs in the company's bathroom because they wanted to "give Slane the benefit of the doubt." Yet they refused to give any consideration to his doctor's statement explaining that he was unable to take the drug test, and they refused to reconsider their firing decision even after Slane explained the situation. As it did in the district court, Mariah points to the evidence it presented to contradict Slane's evidence. But the jury heard all of that evidence and apparently decided to give greater weight to Slane's view of the case. It was up to the jury to decide what view of the evidence was more palatable.

The finding that the verdict was supported by the evidence also disposes of Mariah's passion and prejudice claim. *See Dresser Indus. Inc. v. Gradall Co.*, 965 F.2d 1442, 1449 (7th Cir. 1992) ("a finding that damages were not monstrously excessive or unsupported by the evidence necessarily precludes a finding of passion and prejudice").

Finally, the district court did not abuse its discretion in awarding costs to Slane. Under Federal Rule of Civil Procedure 54(d)(1) "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Mariah argues that the court erred in

awarding costs to Slane because Slane did not "prevail" in the suit; rather, Slane won two claims and Mariah won two. The district court correctly noted that when one party gets substantial relief it "prevails" even if it doesn't win on every claim. *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1014 (7th Cir. 1985). Slane got $225,000 from the jury. By any definition, he won the battle. The court's conclusion that Slane prevailed was more than reasonable.

For these reasons, we affirm the judgment of the district court.

A true copy:

Teste:

/s/_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Filed December 15, 1997]

No. 94-C-4241-JPG

REX SLANE,
Plaintiff,

v.

MARIAH BOATS, INCORPORATED,
Defendant.

ORDER

Before the Court is defendant Mariah Boat, Inc.'s ("Mariah") Motion for Judgment as a Matter of Law, or for a New Trial, or for Remittitur (doc. No. 99) along with a memorandum of law in support (doc. no. 100). The plaintiff, Rex Slane ("Slane"), filed a response (doc. no. 107) along with a memorandum of law in support (doc. no. 108). After reviewing these documents, the Court **DENIES** the motion.

I. BACKGROUND

Slane brought a three-count complaint against Mariah alleging that Mariah discriminated against him in violation of

the Americans with Disabilities Act and the Illinois Workers Compensation Act. At the close of plaintiff's evidence, Mariah moved for judgement as a matter of law on all three counts. The Court granted the motion with respect to Count IV under the ADA, but denied the remainder of the motion. At the close of defendant's case, the Court again denied Mariah's motion for judgment as a matter of law regarding Counts II and III. The jury returned a $225,000 verdict for Slane, including $125,000 in punitive damages.

II. JUDGMENT AS A MATTER OF LAW

Mariah mistakenly argues that the standard for entering judgment as a matter of law is governed by Illinois law because Counts II and III involve Illinois law. In that regard, the Seventh Circuit explicitly stated that it will apply "the federal reasonable-person standard across the board: pre-trial, mid-trial, post-trial, and on appeal, for evaluating both the merits and the quantum of relief. Contrary decisions are no longer authoritative." *Mayer v. Gary Partners & Co.*, 29 F.3d
330, 335 (7th Cir. 1994). This, however, has little bearing on the final result.

"A motion for judgment as a matter of law should be granted only when there can be but one conclusion from the evidence." *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 636 (7th Cir. 1996) (quoting McNabola v. Chicago Transit Authority, 10 F.3d 501,515 (7th Cir.1993)). In ruling on a motion for judgment as a matter of law (formerly known as a "JNOV"), a district court must determine "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the

verdict when viewed in a light most favorable to the party to whom the motion is directed." *Sanders v. City of Indianapolis*, 837 F.Supp. 959, 961 (S.D. Ind. 1992) (quoting Cygnar v. Chicago, 865 F.2d 827, 834 (7th Cir.1989)); *see also Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 100 F.3d 1241, 1254-55 (7th Cir. 1996). In applying this standard, the Court is not free to weigh the evidence, to pass on the credibility of witnesses, or to substitute its judgment of the facts. *Rakovich v. Wade*, 850 F.2d 1180, 1188 (7th Cir.) (en bane), *cert. denied*, 488 U.S. 968 (1988). "If the evidence, taken as a whole, provides a sufficient probative basis upon which a jury could reasonably reach a verdict, without speculation over legally unfounded claims, the motion should be denied." *Cygnar*, 865 F.2d at 835 (citing Anderson v. Gutschenritter, 836 F.2d 346, 348 (7th Cir. 1988)). The role of the Court is not to reweigh the evidence, but only to ensure that the jury rationally considered the evidence. *Pierce v. Atchison, Topeka and Santa Fe Ry. Co.*, 110 F.3d 431,441 (7th Cir. 1997).

Defendant has simply reasserted the same arguments that this Court has twice rejected. Mariah claims that the evidence was insufficient to support the jury's finding of liability. Specifically, Mariah argues that the evidence did not support a causal connection between the discharge and the filing of the workers' compensation claim and that the evidence did not support a finding that Mariah's excuse for the discharge was pretextual.

An employee may recover under Illinois law if he is discharged by an employer that anticipates that the employee will file a workers' compensation claim. *Beckman v. Freeman United Coal Mining Co.*, 527 N.E.2d 303 (I11. 1988). If the

employer proffers a non-retaliatory excuse for the discharge, the plaintiff must show that the proffered reason is pretextual. *Miller v. J.M. Jones Co.*, 587 N.E.2d 654 (Ill. App. Ct. 1992).

The evidence at trial was sufficient for a jury to reasonably reach the verdict it did. At the time of the discharge, Mariah was aware that Slane became ill at work and needed medical attention as a result. The employer was also aware that the temperature in the factory was above eighty degrees, and that Slane was suffering from heat exhaustion type symptoms. Drawing all inferences in favor of the jury verdict, it is not irrational for a jury to infer that Mariah put two and two together. That is, the heat exhaustion symptoms plus high temperature in the working area equals a potential workers' compensation claim. This evidence sufficiently supports the conclusion reached by the jury in this case.

The defendant must lose on his second argument as well. "Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125 (7th Cir. 1997) (citations omitted). The pretext inquiry focuses on the honesty--not the accuracy--of the employer's stated reason for the termination. *See Helland v. South Bend Community Sch. Corp.*, 93 F.3d 327, 330 (7th Cir.1996), *cert. denied*, --- U.S. ---, 117 S.Ct. 769 (1997). Thus, when the stated reason for termination is not the actual reason, it is pretextual. *Id.* The mere fact that the employer acted incorrectly or undesirably, however, cannot adequately demonstrate pretext; rather, the employee must prove that the employer did not honestly believe the reasons it gave for the

firing. *Wolf v. Buss (America), Inc.*, 77 F.3d 914, 919 (7th Cir.), *cert. denied*, -- U.S. ---, 117 S.Ct. 769 (1997). A plaintiff can prove the incredibility of the employer's proffered reason for the termination, and thereby demonstrate pretext, by showing that the employer's proffered reasons are (1) factually baseless, (2) not the actual motivation for the discharge, or (3) insufficient to motivate the discharge. *Id.* Moreover, the "fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." *Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11(1993)).

Mariah argues that it discharged Slane because he refused to provide a urine sample for a mandatory drug test. As evidence of pretext, Slane showed that Mariah discharged him while he was still in the hospital, just a few hours after Slane became ill at the workplace. Mariah's acting officer admitted at trial that he did not investigate the situation because he did not want to discover any information that might defeat a valid reason to discharge Slane. Rather, he quickly discharged Slane upon discovering that Slane had "refused the drug test." The evidence also demonstrated that Slane was medically unable to provide a urine sample but that Mariah refused to consider this in making its decision to discharge Slane.

Mariah emphatically points out all the evidence in its favor. But, that the evidence would have also supported a conclusion different than the one reached by the jury is not a valid argument. Rather, the standard strictly requires that the

evidence be such that only one conclusion could have been reached. Considering all of the evidence and drawing all inferences in favor of the non-moving party, the Court finds that the jury verdict was adequately supported.

III. NEW TRIAL

The test to be applied in determining whether a motion for a new trial should be granted is whether (1) the verdict is against the weight of the evidence, (2) the damages are excessive, or (3) for some other reasons, the trial was not fair to the moving party. *Emmel*, 95 F.3d at 636 (citing McNabola at 516). Mariah claims that a new trial should be ordered because the jury verdict was against the weight of the evidence and a result of passion and prejudice.

The jury verdict was not against the weight of the evidence. As the earlier discussion demonstrated, this was a very close case with sufficient evidence on both sides to support a verdict either for the plaintiff or the defendant. This Court will not, nor should it, re-weigh the credibility of the witnesses as Mariah seems to argue. The jury made its decision which witnesses were testifying honestly and which ones were not. The fact that Mariah had more witnesses testify in its favor than did the plaintiff is not enough to order a new trial. If that were the case, every jury trial would result in a competition between the parties to see who could present the most testimony in their favor. To Mariah's dismay, that is not how the system operates.

Mariah also argues that the verdict was flawed because the jury was influenced by passion and prejudice. As the Seventh Circuit has noted, "a new trial, and not remittitur, is

required when an award is the result of passion and prejudice, because the prejudice may have infected the verdict itself." *Dresser Indus, Inc. v. Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992). Passion and prejudice cannot be inferred merely from the size of the verdict, but must be demonstrated by something identifiable. *See Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952).

Mariah claims that the evidence about Slane's diabetes created the passion and prejudice. In particular, Mariah states that "all of the evidence presented by Slane with respect to his diabetes and the negative effects it has on his life remained in the minds of the jurors even though the diabetes was irrelevant to Slane's claim of retaliatory discharge under the Workers' Compensation Act." This argument has very little merit. First, Mariah failed to object to the presentation of this evidence at trial. Second, Slane's diabetic condition was at issue throughout the trial, especially during the discussion of his inability to produce a urine sample (Mariah's stated reason for his discharge). Third, Mariah did not ask the Court to instruct the jury to disregard this evidence. And, finally, Mariah could have avoided much of Slane's testimony by filing a timely motion for summary judgement regarding the ADA claim. Mariah chose not to do this. Rather, Mariah made the tactical decision to allow the claim to go before the jury and then argue its motion for judgment as a matter of law at the close of plaintiff's evidence. Everything argued by Mariah in that motion was available long before trial and could have been included in a motion for summary judgment. Mariah can only blame itself for whatever passion, if any, might have developed.

One final note. "[A] finding that damages were not

monstrously excessive or unsupported by the evidence necessarily precludes a finding of passion and prejudice." *Dresser*, 965 F.2d at 1449. As will be demonstrated, the verdict is rationally related to the evidence and, therefore, not affected by passion and prejudice.

IV. REMITTITUR

A district court has authority to grant a remittitur if the circumstances so warrant. *American Nat'l Bank & Trust Co. of Chicago v Regional Trans. Auth.*, 125 F.3d 420, 437 (7th Cir. 1997). In order for the circumstances to so warrant, however, a jury award must be "'monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence.'" *Dresser Indus., Inc.*, 965 F.2d at 1446 (quoting Pincus v. Pabst Brewing Co., 893 F.2d 1544, 1554 (7th Cir. 1990)); *accord Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997). Because damage calculations are essentially an exercise in factfinding, review of the jury's damage award is deferential. *Dresser Indus., Inc.*, 965 F.2d at 1446.

A. Back Pay

The jury awarded Slane $50,000 in back pay and benefits. Mariah argues that this award should be reduced because Slane was medically unable to work or, in the alternative, he failed to mitigate damages. First, Slane was medically able to work in the same capacity he had worked prior to the discharge. Second, Slane sought employment from over 90 employers and was rejected by them all. Slane lost three years of income, approximately $42,000, and the equal value of his insurance benefits. It was perfectly rational for the jury to agree on $50,000 as an estimation of Slane's

back pay.

B. Compensatory Damages

The jury awarded Slane $50,000 in compensatory damages for intangible losses. Mariah argues that this award should be reduced because Slane provided no expert testimony to support his claim. Rather, Mariah continues, "Slane offered only his own testimony and that of his mother and sister to support a claim for any intangible loss." A plaintiff must actually prove that he suffers from emotional distress and that the discrimination caused that distress. *United States v. Balistrieri*, 981 F.2d 916, 931 (7th Cir. 1992). Nonetheless, the Seventh Circuit has repeatedly held that a plaintiff's testimony alone may be sufficient to support such a claim. *Id.* A court must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused the emotional distress. *Id.*

Mariah fired Slane shortly after he was taken from work to the hospital and while he was still admitted to the hospital. At some point during his unsuccessful search for a new job, Slane became depressed and suicidal. He feared that he would never find a job like the one he had with Mariah. His income was reduced to the point that he could no longer afford his medical needs. Without the insurance benefits that accompanied his employment with Mariah, Slane was forced to turn to social security for help. With this story before it, the jury determined that $50,000 was adequate compensation for the pain. "The jury is in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury." *Id* at 933. Given that deference to the jury, the Court finds that the testimony of Slane and his

family was sufficient to support the award.

C. Punitive Damages

The jury awarded Slane $125,000 in punitive damages. Mariah argues that punitive damages were not warranted under the facts of this case. Punitive damages are properly awarded when the defendant acts intentionally, willfully, or with deliberate indifference. See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (I11. 1978); *Merriweather v. Family dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir. 1996). Mariah argues that it fired Slane because he failed to comply with a mandatory drug test. The evidence shows, however, that Mariah ignored a valid medical reason for failing to supply the necessary urine sample. One of Mariah's managers testified that he did not want to investigate the situation prior to terminating Slane because he had a valid excuse for the discharge and did not want to ruin it. Furthermore, Mariah's owner testified that it made no difference that Slane actually passed the drug test when he was medically able to urinate the very next day. This evidence was sufficient for the jury to conclude that Mariah acted in a manner that warranted punishment. Punitive damages were properly awarded.

V. CONCLUSION

The jury's verdict was sufficiently supported and was not against the weight of the evidence. In addition, the jury's award of damages was not monstrously excessive, but was rationally connected to the evidence of this case. For the forgoing reasons, Mariah's motion for judgment as a matter of law, new trial, or remittitur is **DENIED**. Doc. no. 99.

IT IS SO ORDERED.

DATE: December 15, 1997

/s/_____
J. PHIL GILBERT
CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Filed November 7, 1997]

No. 94-C-4241-JPG

REX SLANE,	)
Plaintiff,	)
	)
v.	)
	)
MARIAH BOATS, INCORPORATED,	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

This action come on for trial before the Court and a jury, Honorable J. Phil Gilbert, Chief District Judge, presiding, and the issues on Counts II and III of the Complaint having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that Plaintiff, Rex Slane, recover of Defendant, Mariah Boats, Inc., the sum of $225,000.00.

Dated: November 7, 1997

NORBERT G. JAWORSKI, CLERK

/s/_____
Deputy Clerk

APPROVED:

/s/_____
J. PHIL GILBERT
CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Filed February 9, 1999]

No. 98-1127 & 98-1128
No. 94-C-4241

Appeal from the United States District Court for the Southern District of Illinois

REX SLANE,
Plaintiff-Appellee, Cross-Appellant,

v.

MARIAH BOATS, INCORPORATED,
Defendant-Appellant, Cross-Appellee.

ORDER

Before BAUER, MANION, and EVANS, Circuit Judges.

On January, 25, 1999, Mariah Boats, Incorporated filed a petition for rehearing. All the judges on the original panel have voted to deny the petition, and it is therefore DENIED.